Tentative Rulings for November 17, 2022
Department 403

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

21CECG03565 ***Diligent Investment, Inc. v. Subway Real Estate LLC*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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(35)

Tentative Ruling

Re: ***Jesus Espinoza v. Mario Melgarejo-Torres***
Superior Court Case No. 18CECG01036

Hearing Date: November 17, 2022 (Dept. 403)

Motion: By Defendants Mario Melgarejo-Torres and Samuel Melgarejo Reyes for Terminating Sanctions

Tentative Ruling:

To grant the defendants' motion for terminating sanctions against plaintiff Jesus Espinoza, as plaintiff Jesus Espinoza has willfully refused to comply with this court's order compelling him to respond to discovery. To strike plaintiff Jesus Espinoza's complaint and dismiss the action against each of defendant Mario Alberto Melgarejo-Torres and Samuel Melgarejo Reyes. Defendants shall submit a proposed judgment consistent with the court's order within 10 days of service of the order by the clerk.

Explanation:

Code of Civil Procedure section 2023.010, subdivision (g) makes "[d]isobeying a court order to provide discovery" a "misuse of the discovery process," but sanctions are only authorized to the extent permitted by each discovery procedure. Once a motion to compel answers is granted, continued failure to respond or inadequate answers may result in more severe sanctions, including evidence, issue or terminating sanctions, or further monetary sanctions. (Code Civ. Proc. §§ 2030.290, subd. (c); 2031.300, subd. (c).)

Sanctions for failure to comply with a court order are allowed only where the failure was willful. (*Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327.) If there has been a willful failure to comply with a discovery order, the court may strike out the offending party's pleadings or parts thereof, stay further proceedings by that party until the order is obeyed, dismiss that party's action, or render default judgment against that party. (Code Civ. Proc. § 2023.030, subd. (d).)

Here, on August 10, 2022, the court ordered plaintiff Jesus Espinoza to serve verified responses to the discovery requests within 10 days of the court's order. The court's order was served on plaintiff Jesus Espinoza on August 10, 2022, by mail. However, plaintiff Jesus Espinoza never served verified responses to any of the discovery requests within 10 days, despite the passage of more than 10 days since the order was served on him. Therefore, it appears that plaintiff Jesus Espinoza is willfully refusing to comply with the court's order compelling him to answer the discovery requests. Nor does it appear likely that any lesser sanctions would be effective to obtain plaintiff Jesus Espinoza's compliance here, as it appears that he has no interest in responding to defendants' discovery or otherwise participating in the action that he filed.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/15/22.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Ronald Reyes v. Omni Family Health***
Superior Court Case No. 22CECG00509

Hearing Date: November 17, 2022 (Dept. 403)

Motion: Defendants' Motion to Transfer Venue

Tentative Ruling:

To grant defendants' motion to transfer venue to Kern County Superior Court. (Code Civ. Proc. § 395, subd. (a); 395.5.)

Explanation:

"Except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in this title, the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." (Code Civ. Proc., § 395, subd. (a).)

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." (Code Civ. Proc., § 395.5.)

"The principal place of a business of a corporation is its residence for the purpose of determining venue." (*All-Cool Aluminum Awning Co. v. Superior Court of Kern County* (1964) 224 Cal.App.2d 660, 666, internal citations omitted.)

"'Where the action is not commenced in the county of any defendant's residence, the individual defendant then is entitled, under section 395, to secure a change of venue to the county where some or all of the defendants reside.'" (*J. C. Millett Co. v. Latchford-Marble Glass Co.* (1956) 144 Cal.App.2d 838, 841, quoting *Hale v. Bohannon* (1952) 38 Cal.2d 458, 473.) "'A plaintiff cannot by joining a corporation or corporations as defendants, under the circumstances of this case, impair the right or thwart the exercise of the right of an individual defendant to remove the cause to the county of his residence.'" (*Ibid*, quoting *Pacific Bal Industries v. Northern Timber, Inc*. (1953) 118 Cal.App.2d 815, 828.) Thus, "when individual defendants residing in Los Angeles were joined, this amounted to a waiver so far as the corporate defendants were concerned, and the motion should have been granted." (*Id.* at p. 842.)

Here, defendants have presented evidence showing that the principal place of business of the corporate defendant, Omni Family Health, is in Kern County. (Cooper decl., ¶ 8.) Omni's department of human resources is also located in Kern County. (*Id*. at ¶ 10.) Plaintiff applied for a job with defendant, was interviewed by defendant, and worked for defendant out of Omni's corporate office in Bakersfield. (*Id*. at ¶¶ 13-15.) Omni's finance department, payroll department, and its senior management and

personnel are all located in Kern County. (*Id*. at ¶ 10.) In addition, Milad Khalil, Omni's Chief Financial Officer, and Omni's CEO also work at Omni's corporate office in Kern County. (Khalil decl., ¶5, Cooper decl., ¶ 10.) Mr. Khalil also resides in Kern County. (Khalil decl., ¶ 3.)

Thus, defendants have met their burden of showing that the action was filed in the wrong county, as defendants reside and have their principal place of business in Kern County and they are entitled to have the action tried there. While plaintiff normally would have the right to sue the corporate defendant in the county where the liability was incurred, where the contract was entered into, where the contract was to be performed, or where the contract was breached (Code Civ. Proc. § 395.5), plaintiff loses the right to bring the action in such counties if he adds an individual defendant to the action who resides in a different county unless one of the corporate defendants has its principal place of business in the county where the action was filed. (*J.C. Miller Co. v. Latchford-Marble Glass Co.*, *supra*, 144 Cal.App.2d at pp. 841-842.) In such cases, the individual defendant has the right to have the case transferred to the county where he resides. (*Ibid*.) Also, transfer is mandatory under section 395, subdivision (a). (*Forster v. Superior Court* (1992) 11 Cal.App.4th 782, 787.)

In the present case, there is no dispute that Mr. Khalil resides in Kern County, and the undisputed evidence also shows that Omni's principal place of business is in Kern County. As a result, since plaintiff named Mr. Khalil as a defendant in the action, he no longer has the right to sue in Fresno County even though he alleges that the contract was entered into in Fresno, the wrongful conduct occurred here, and Omni does business here. The court must grant defendants' motion to transfer venue to Kern County, which is Mr. Khalil's county of residence.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/15/22.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Don Arax v. Fresno Unified School District***
Superior Court Case No. 22CECG02449

Hearing Date: November 17, 2022 (Dept. 403)

Motion: (1) Defendant Thomas' Special Motion to Strike
(2) Defendant Fresno Unified School District's Special Motion to Strike

Tentative Ruling:

To deny both motions to strike the complaint. (Code Civ. Proc. § 425.16.) To deny all parties' requests for attorney's fees. (*Ibid*.)

Explanation:

A special motion to strike provides a procedural remedy to dismiss nonmeritorious litigation meant to chill the valid exercise of the constitutional rights to petition or engage in free speech. (Code Civ. Proc., §425.16, subd. (a); see *Martinez v. Metabolife Intern., Inc*. (2003) 113 Cal.App.4th 181, 186.)

The court engages in a two-step process in determining whether an action is subject to the anti-SLAPP statute: first, the court decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, by demonstrating that the facts underlying plaintiff's complaint fit one of the categories set forth in section 425.16, subdivision (e); if the court finds that such a showing has been made, it then determines whether plaintiff has demonstrated a probability of prevailing on the claim. (Code Civ. Proc., §425.16; *Cross v. Facebook, Inc*. (2017) 14 Cal.App.5th 190, 198.)

Plaintiff in this action alleges a single cause of action for defamation based on statements made by defendant Keshia Thomas, an elected Trustee for defendant Fresno Unified School District, following a viral social media post featuring a photograph of a student in the weight room at Bullard High School wearing what appeared to be a Ku Klux Klan hood. Thomas participated in a staff meeting at Bullard High School as well as press conferences with Superintendent Robert Nelson in the days following the public outcry over the picture.

On May 17, 2022 Thomas participated in a GV Wire discussion titled "Bullard High and Racism in Fresno Unified." Thomas was one of three guests on the program and was identified as an FUSD Trustee. During the program, which aired online, Thomas had the following exchange with host Darius Assemi:

> Thomas: "Then my son, my middle son, goes to football practice, where he has Arax calling him a n----- and he decides he's not playing for Bullard anymore. Ok. And he ends up playing at Edison."

Assemi: "Could you tell our audience … you said Arax. Who is Arax?"

> Thomas: "Yeah. He's the football coach at Bullard. You know … so my son, when he was starting high school, my 23 year old, when he was starting high school he said "mom I am not going to play football for them because the coach is saying this to me, and this is before I became a trustee."

(Complaint[1] ¶ 10.)

The accusation against plaintiff from this interview was later republished in a written article on GV Wire on May 20, 2022 with a follow up comment from Thomas texted to GV Wire that plaintiff was "completely unfit … a distraction to well intentioned people … [not] present" in the weight room. (*Id*. at ¶ 20.)

Prong 1: Whether Plaintiff's Action Arises from Defendant's Constitutionally Protected Speech

A defendant first has the burden of showing that the action against it arises from the exercise of free speech rights and/or right to petition. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658.)

Here, plaintiff has conceded in his opposition that defendants' activities meet the first prong of the test under section 425.16 because they arise out of defendants' protected activities. Therefore, there is no need to discuss the first prong of the test.

Prong 2: Probability of Success

A plaintiff's complaint need only be shown to have "minimal merit". (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 95.) The plaintiff must show that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Navellier*, *supra*, 29 Cal.4th at 88-89.) In considering this issue, the court looks at the " 'pleadings, and supporting and opposing affidavits … upon which the liability or defense is based.' " (*Soukup*, *supra*, at 269.)

The plaintiff must show: (1) a legally sufficient claim (i.e., a claim which, if supported by facts, is sustainable as a matter of law); and (2) that the claim is supported by competent, admissible evidence within the declarant's personal knowledge. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654-655 and *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) It has been stated that this test is similar to the standard applied in summary judgment motions pursuant to Code of Civil Procedure section 437c; to wit, the plaintiff's burden is to demonstrate a prima facie case. (*Church of Scientology*, *supra* at 654, fn. 10.)

[1] Judicial notice of the complaint is taken as requested by each moving party.

Defamation

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312.)

Plaintiff's complaint broadly describes "false and defamatory statements" and includes factual allegations of multiple statements made by Thomas in the time following the social media post. (See Complaint, ¶¶ 7-10, 18, 20.) Plaintiff's opposition is directed at defendant Thomas' statements during the May 17, 2022 GV Wire interview (Complaint ¶¶ 10, 20), the May 20, 2022 GV Wire written account of the statements made during the interview (*Id*. at ¶ 20), and Thomas' comments on the dispute with plaintiff in the May 20, 2022 written GV Wire article (*Id*. at ¶20). (Opposition to Keshia Thomas, 6:14-18; Opposition to FUSD, 7:11-15.) Plaintiff is not opposing defendants' special motions to strike as to the allegations of defamation based on Thomas' statements at the May 6, 2022 staff meeting (Complaint, ¶ 7), two press conferences (*Id*. at ¶¶ 8 and 9), and May 26, 2022 letter to Bullard High School principal (*Id*. at ¶ 18). As such, the analysis will focus on the merits of the arguments advanced by the parties regarding the GV Wire statements.

Civil Code § 47(a) Official Duty Privilege

The official duty privilege in Civil Code section 47(a) applies to a broad class of statements, including statements made by policy makers to the press regarding public issues. "Because a public official's duty includes a duty to keep the public informed of his or her management of the public business, press releases, press conferences and other public statements by such officials are covered by the 'official duty' privilege ….." (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1149, fn. 6; see also *Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1431 [superintendent of schools "had an official duty to communicate with the press about matters of public concern"].)

Defendant Thomas contends her statements to GV Wire were made while participating in the interview as a trustee for FUSD and as such are absolutely privileged pursuant to Civil Code section 47, subdivision (a). (*Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 500 [statements made by school board of trustees during the discharge of their official duties is absolutely privileged].) Thomas relies on her declaration that the interview was in her capacity as an FUSD Trustee and plaintiff's complaint alleging that Thomas was "within the course and scope of her agency as an FUSD agent and elected trustee" as evidence that there is no dispute that these statements are subject to privilege as discharge of an official duty. (See, Thomas Decl. ¶ 5; Complaint ¶ 21.)

Plaintiff disputes that Defendant Thomas's statements to the press were subject to privilege under section 47(a). Plaintiff contends Fresno Unified School District's assertion that it is not liable for Thomas' statements to GV Wire because she was not in the course and scope of her position as a trustee defeats Thomas' claim that she was acting in an official capacity. (Opposition to Thomas, 7:25-28; Plaintiff's RJN[2] Nos. 1 and 2.)

[2] Plaintiff's Request for Judicial Notice Nos. 1 and 2 are granted.

Simultaneously plaintiff is making the argument in opposition to Fresno Unified School District's special motion to strike that FUSD has submitted no evidence to support its assertion that Thomas was not in the course and scope of her position as trustee and therefore it is vicariously liable for her statements. (Opposition to FUSD, 8:6-24.) The only evidence of Thomas' acting in an official capacity by participating in the GV Wire interview is her own declaration contradicting the arguments made by FUSD. (FUSD RJN[3] No. 5, Declaration of Keshia Thomas.)

The moving parties have not produced sufficient evidence[4] to establish either position as to whether Thomas was in the course and scope of her duties as a trustee participating in the interview with GV Wire.

Further, the evidence submitted does not address whether the admittedly personal experience shared during the interview can be considered a statement within the course and scope of defendant's duty as a trustee. (*Lipman v. Brisbane Elementary School District* (1991) 55 Cal.2d 224, 234 [a school district trustee making false statements to the press was beyond the scope of the trustee's power].) The court cannot find the "official duty" privilege in Civil Code section 47, subdivision (a) applies to the statements for purposes of this motion.

Limited Public Figure

> A threshold determination in a defamation action is whether the plaintiff is a "public figure." The courts have "defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' [Citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351, 94 S.Ct. 2997, 41 L.Ed.2d 789.] Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his [or her] reputation only to the extent that the allegedly defamatory communication relates to his role [or her] in a public controversy." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253–254, 208 Cal.Rptr. 137, 690 P.2d 610.)

(*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 113.)

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[3] Defendant FUSD's Request for Judicial Notice No. 5 is granted.

[4] Defendant Thomas in reply has offered additional documents to address the question of whether she was in the course and scope of her duties as a trustee while participating the in the GV Wire interview. (See, Thomas Reply Decl., Reply RJN No. 1 and Berger Reply Decl. Exh. C.) However, the court declines to consider defendant's evidence that was submitted with her reply, as it would be a denial of due process to consider the late-filed evidence without giving defendant a chance to respond to it. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.) Plaintiff's Objections to Thomas' Reply Declaration, the Reply Declaration of Bruce Berger and Further Request for Judicial Notice on Reply are sustained.

Defendants contend plaintiff is a limited public figure as a well-known high school football coach and the statements at issue pertained to his role as a coach. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 115.) Professional and collegiate athletes and coaches have been held to be limited purpose public figures, reasoning that their "voluntary decision to pursue a career in sports, whether as athlete or coach, 'invites attention and comment' regarding job performance and thus constitutes an assumption of the risk of negative publicity." (*Id*. at 114, quoting *Barry v. Time, Inc.* (N.D.Cal 1984) 584 F.Supp.110, 119.)

Plaintiff's role as a coach at Bullard High School is not the focus of the public interest in the conversation about racism in the school district until Thomas' statements to GV Wire implicated him in this controversy. Plaintiff did not inject himself into this controversy or hold himself out as someone with authority to exert influence over the controversy any more than other coaches, teachers or staff. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351 ["More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."].)

Thomas contends that the use of racial epithets toward Bullard's student athletes is of import to those who follow the team, including current students, potential recruits and fans. (*McGarry, supra*, 154 Cal.App.4th at. 109.) The accusations of use of racist language by plaintiff likely drew more attention to plaintiff, but a defendant cannot use that attention to argue he is a public figure in defense of making the statements. (*Hutchinson v. Proxmire* (1979) 443 U.S. 111, 134-135 ["[T]hose charged with defamation cannot, by their own conduct, create their own defense by making claimant a public figure."].)

FUSD contends that plaintiff has invited the public eye through his participation in local media. The news articles provided by FUSD demonstrate plaintiff has commented on safety measures for high school football players and the effect of Covid-19 restrictions on local high school football. (See, FUSD RJN[5], Exh. B, C, and D.) His media presence on the topic of local high school football does not demonstrate that he has injected himself or his views into public controversy to consider plaintiff a limited public figure in connection with the conversation about racism at Bullard High School and within the school district. As plaintiff points out, the host of the discussion had to ask Thomas, "Who is Arax?" (Complaint, ¶ 10.) Plaintiff had no known role in the controversy until Thomas's statements regarding her son's experience years earlier named him.

The court declines to designate plaintiff as a limited public figure based on the evidence and arguments submitted with this motion[6].

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[5] Defendant FUSD's Requests for Judicial Notice Nos. 2, 3 and 4 are granted.

[6] Having found plaintiff is not a limited public figure, the remaining objections to Thomas' evidence of her belief in the truth of the statements (Plaintiff's Objection to the Thomas Declaration Nos. 2, 3 and 4; Thomas' Objections to the LeMay, Day, Fulcher, Williams and Cole Declarations) and objections to plaintiff's evidence intended to support a finding of actual malice (Thomas' Objections to Arax Declaration Nos. 2 and 3) are overruled as none are material to the outcome of this motion.

False Statements

The essential element of defamation is the publication of a false statement of *fact*. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600.)

> The reason for the rule, well stated by the high court, is that "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339–340 [41 L.Ed.2d 789, 805, 94 S.Ct. 2997], fn. omitted; see also *In re Blaney* (1947) 30 Cal.2d 643, 649 [184 P.2d 892].) In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse.

(*Gregory, supra,* 17 Cal.3d at pp. 600-601.)

> [I]t is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a **provably false assertion of actual fact**. If that question is answered in the affirmative, the jury may be called upon to determine whether such an interpretation was in fact conveyed."

(*Kuhn v. Bower* (1991) 232 Cal.App.3d 1599, 1608, emphasis added.)

In the case at bench, there are three statements at issue: (1) Thomas' statements to GV Wire on May 17, 2022; (2) the republication of those statements in the May 20, 2022 GV Wire article; and (3) Thomas' comments in response to plaintiff's denial of the use of a racial slur to her son published in the May 20, 2022 GV Wire article. The first two statements concern the accusation of plaintiff's use of a racial slur toward Thomas' son, an allegation of fact that can be proven true or false. Plaintiff denies using a racial slur to refer to Thomas' son or other students. (Arax Decl., ¶ 3[7].) As such, plaintiff has met his burden of producing evidence to demonstrate that he has a legally sufficient claim for defamation based on the May 17, 2022 statements made during the GV Wire interview and their republication in the GV Wire article on May 20, 2022.

Defendant FUSD contends that Thomas' comments to GV Wire given in response to plaintiff's comments on the accusation in the May 17, 2022 interview represent Thomas' opinion and not a fact that can be proven false. FUSD relies on *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254. In determining whether a statement is actionable fact or nonactionable opinion, *Baker* instructed courts to use a " 'totality of the circumstances' " test. (*Id.* at p. 260.) Under the totality of the circumstances test, "[f]irst, the language of the statement is examined. For words to be defamatory, they

[7] The court notes Thomas's Objection No. 1 to part of paragraph 3 of the Arax Declaration and intends to sustain the objection. However, the plaintiff's denial of the use of the racial slur is not within the objectionable portion of the paragraph and is admissible evidence to demonstrate the statement is false for purpose of this motion.

must be understood in a defamatory sense.... [¶] Next, the context in which the statement was made must be considered." (*Id.* at pp. 260–261.)

"Where the language of the statement is 'cautiously phrased in terms of apparency,' the statement is less likely to be reasonably understood as a statement of fact rather than opinion. [Citation.]" (*Baker*, *supra*, 42 Cal.3d at pp. 260–261, fn. omitted; accord, *John Doe 2 v. Superior Court*, *supra*, 1 Cal.App.5th at pp. 1306, 1320 [finding statement that "I do not like people perpetuating what I consider bad business practices" not actionable because the "I do not like" language "underscores [the defendant's] intention to communicate a personal opinion rather [than] imply an objective and defamatory accusation of fact"].)

In the context of the GV Wire article, Thomas' comments as published were given in response to Arax's denial of the incident, criticism of Thomas, and explanation regarding the weight room photo that sparked the discussion of racism within the school district. (See, Arax Decl. Exh. B, "Bullard Coach Calls Trustee a 'Liar' on Racial Slur Accusation, Says 'Investigate Me.'") Plaintiff's complaint quotes selected portions of Thomas' comment as published that he was "'completely unfit.. a distraction to well intentioned people…[not] present' in the weight room." (Complaint, ¶ 20.) The entire paragraph containing the comments reads as follows:

> Thomas, who said her comments would be the last from her on this issue, said Arax is "completely unfit to be in this discussion, and he is a distraction to well intentioned people and efforts. It would be in his interest to treat students well, be present in the weight room so this never happens again, find them scholarship opportunities, (refrain) from referring to them in a demeaning manner and cease comments on this topic as well."

Within the context of the article, Thomas' comments to the reporter in response to plaintiff's reaction to the May 16, 2022 accusations appear to represent her opinion of plaintiff's reaction. Whether plaintiff is fit to participate in the larger discussion of racism at the school or a distraction are not provably false facts. As quoted in the complaint, Thomas' statement regarding plaintiff's presence in the weight room appears to be an assertion of fact that he was not there. However, when read in the context of the article, the statement is advisory in nature and not an assertion of fact. Even assuming the statement was meant to imply that had plaintiff been present the weight room incident would not have occurred, this hypothetical is not a provable factual assertion by Thomas and is not defamatory on its face.

Plaintiff has not demonstrated that the comments to the reporter as published in the May 20, 2022 GV Wire article, constitute actionable defamation.

However, plaintiff has demonstrated that the cause of action for defamation against Thomas and FUSD based on Thomas' comments made during the May 16, 2022 GV Wire interview and their republication in the May 20, 2022 GV Wire article can proceed. As such, the motions to strike the complaint are denied. Given the many alleged instances of defamatory statements within the complaint, and wide-ranging allegation of the "false and defamatory statements" found in paragraph 24 of the

complaint, the motions cannot be said to have been frivolous or intended to cause delay. (Code Civ. Proc. § 425.16, subd. (c)(1).) The court intends to deny all parties' requests for attorney's fees.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/16/22.
(Judge's initials) (Date)